

1995

State of Utah v. Joshua Jacob St. Clair : Brief of Appellee

Utah Court of Appeals

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UTAH
DOCKET
51
IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

JOSHUA JACOB ST. CLAIR,

Defendant/Appellant.

DOCKET NO. 950152-CA

Priority No. 2

Case No. 950152-CA

BRIEF OF APPELLEE

AN APPEAL FROM CONVICTIONS FOR THEFT, A
SECOND-DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 76-6-404 (1995), AND CRIMINAL MISCHIEF,
A THIRD-DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 76-6-106(1)(c) (1995), IN THE THIRD
JUDICIAL DISTRICT COURT FOR TOOELE COUNTY,
STATE OF UTAH, THE HON. JOHN A. ROKICH,
PRESIDING

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FILED

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

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Defendant/Appellant.

Priority No. 2

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

After defendant pled guilty to one count of theft, a second-degree felony, and one count of criminal mischief, a third-degree felony (R. 20), Judge John A. Rokich sentenced him to two concurrent prison sentences: one to fifteen years for the second-degree felony and zero to five years for the third-degree felony, plus restitution in the amount of \$8,108 (R. 35). Defendant's appeal of his sentence is properly in this Court pursuant to Utah Code Ann. § 78-2a-2(f) (Supp. 1995).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Whether defendant's failure to argue to the trial court that it was required to impose the guidelines sentence precludes his raising the issue for the first time on appeal. Because the trial court did not examine this issue, there is no standard of review applicable.

2. Did the trial court violate equal protection or the uniform application of laws requirement by sentencing defendant to prison and defendant's partner-in-crime, Jason John Black, to probation. An appellate court will modify a district court's discretionary choice in sentencing only if "no reasonable person would take the view adopted by the trial court." State v. Wright, 893 P.2d 1113, 1121 (Utah App. 1995).

3. Whether defendant's failure to file a motion to withdraw his guilty plea in the trial court within 30 days deprives this Court of jurisdiction to determine whether the plea was knowing and voluntary or taken in strict compliance with rule 11, Utah Rules of Criminal Procedure? This issue is a question of law that this Court should review for correctness. State v. James, 819 P.2d 781, 796 (Utah 1991); see also State v. Price, 837 P.2d 578, 583 (Utah App. 1992).

4. Did defendant's failure to file with the trial court an affidavit under rule 63(b), Utah Rules of Civil Procedure, alleging that the judge was biased, bar him from raising the issue on appeal? Because the trial court did not examine this issue, there is no standard of review applicable.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Relevant provisions are included in Addendum A.

STATEMENT OF THE CASE

Procedural history

On November 3, 1994, defendant pled guilty to one count of theft, a second-degree felony, and one count of criminal mischief, a third-degree felony (R. 20). On January 19, 1995, the trial court sentenced defendant to two concurrent prison sentences: one to fifteen years for the second-degree felony and zero to five years for the third-degree felony, plus restitution in the amount of \$8,108 (R. 35). On January 27, 1995, more than sixty days after pleading guilty, defendant moved to withdraw his plea (R. 59). By an unsigned minute entry dated January 30, 1995, the trial court denied the motion to withdraw (*id.*). On February 17, 1995, defendant filed a notice of appeal (*id.*); the trial court has never issued a signed order denying the motion to withdraw (*id.*)

Shortly after defendant filed his docketing statement, the State filed a motion to dismiss the appeal on the grounds that the trial court had not yet issued a final order regarding the motion to withdraw (*id.*). This Court granted that motion in part, dismissing the appeal as it relates to defendant's motion to withdraw his guilty plea (*id.*). Despite this Court's order, defendant's brief dealt

extensively with the motion to withdraw the guilty plea. The State filed a motion to strike these portions on August 28, 1995 and on September 20, 1995, the Court granted the motion. On November 30, 1995, after defendant had filed an untimely response to the motion and the order, this Court vacated its September 20 order, striking only point VII of the defendant's brief.

Statement of facts

This statement is taken from defendant's pre-sentence report, a copy of which is attached to his brief.

Defendant and a group of other people stole a 1994 Ford F150 pickup truck and a 1994 Ford Probe from Timothy Ford/Chrysler Auto Dealership in Tooele, Utah (Pre-sentence investigation, at 2; attached to defendant's brief). They drove the truck up to Middle Canyon, vandalized it, and then drove the Probe to Little Mountain in Grantsville, stripping it of its speakers, spare tire, and jack (*id.*). The group "started to drive the Probe around the gravel pit, jumping it off small hills, running it into hills and spinning circles. After awhile all four began to break the windows and beat on the car. The last thing they did was to put a rock on the accelerator and run it into a ditch" (*id.*). The vandalism to both vehicles caused \$23,000 in damage (*id.*).

SUMMARY OF THE ARGUMENT

Because of defendant's failure to raise issues before the trial court and to file his motion to withdraw his pleas within the 30-day period, he is now precluded from seeking review in this Court. Defendant never argued to the trial court that it had to sentence him to probation because of AP&P's calculation of the guidelines. Rather, defendant "urged" the trial court to adopt the recommendation, implicitly recognizing that it could refuse to do so. Also, even though the trial court told defendant that he only had 30 days in which to withdraw his pleas, defendant did not file for more than two months.

Defendant's also failed to properly bring to the trial court's attention his allegation of bias through an affidavit under rule 63(b), Utah Rules of Civil Procedure. This rule provides a mechanism for bringing allegations of bias and prejudice against a judge and must be used before appeal. These procedural defects prevent this Court from reviewing Points I, III, IV, V, and VI. Nevertheless, even if this Court were to decide the merits of defendant's arguments, it would find that they are insubstantial. They either ignore or misconstrue the governing case law or misstate the evidence in the record.

Defendant's claim that the trial court violated equal protection because it did not give him the same sentence it did to his co-defendant, Jason John Black,

is similarly misplaced. The equal protection does not require that individuals with different characteristics and backgrounds be given the same sentence, even if they were convicted of the same crime. Defendant had a much lengthier juvenile criminal history, showed less cooperation with the police and, in general, appeared a less promising candidate for probation than did Black. Based on these disparate circumstances, defendant cannot say that “no unreasonable person” would have adopted the trial court’s view, i.e., that defendant should be sent to prison.

ARGUMENT

I. BECAUSE DEFENDANT DID NOT GIVE THE TRIAL COURT THE OPPORTUNITY TO ADDRESS THE ARGUMENT THAT THE SENTENCING GUIDELINES REQUIRED THE COURT TO IMPOSE PROBATION, THIS COURT SHOULD NOT REVIEW THE ARGUMENT ON APPEAL.

On appeal, defendant claims that the Utah Sentencing and Release Guidelines required the trial court to give defendant probation. Brief of defendant at 4-5. Although defendant asked the trial court to follow Adult Probation & Parole’s recommendation for probation, he did not argue to the court, as he does now, that it legally had no other choice. Defendant’s present attempt to assert this claim for the first time on appeal violates the “longstanding

rule” that appellants must first give the trial court the opportunity to address an objection. State v. Powell, 872 P.2d 1027, 1030 (Utah 1994); State v. Bywater, 748 P.2d 568, 569 (Utah 1987) (applying to sentencing issues the “longstanding rule” that issues raised for the first time on appeal are waived). Although “plain error” may allow an appellant to survive a failure to raise an issue before the trial court, defendant has not even argued plain error. Finally, the fact that defendant requested the trial court to impose the guidelines sentence probably led the court to believe that it was free to disregard the guidelines. Thus, any attempt to argue plain error would be defeated by the fact that defendant himself invited the court’s ruling and may not now attack it on appeal. State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993).¹

¹ Despite defendant’s inability to raise this claim on appeal due to his failure to raise the issue in the trial court, the idea that trial courts are bound by the sentencing guidelines is simply wrong. In Preece v. House, 886 P.2d 508, 510 (Utah 1994), the Utah Supreme Court concluded that the Board of Pardons and Parole was not required to use the guidelines in fixing a parole release date and that the guidelines did not have the “force and effect of law.” This conclusion logically governs defendant’s analogous claim that the guidelines prohibit courts from using their independent reasoning in setting a sentence.

The actual standard of review here is not whether the sentence exceeded the guidelines but whether “no reasonable person” could adopt the trial court’s view that a prison sentence, rather than probation, was appropriate. State v. Wright, 893 P.2d 1113, 1121 (Utah App. 1995). Given defendant’s 38 prior adjudications of guilt while a juvenile, his refusal to cooperate with AP&P in the pre-sentence investigation process, and the extent of damage committed in this offense, the trial court’s decision to incarcerate defendant seems eminently reasonable.

II. THE DIFFERENT SENTENCES THE TRIAL COURT GAVE DEFENDANT AND JASON BLACK WERE WARRANTED BY THE DIFFERENT CIRCUMSTANCES IN EACH CASE.²

Defendant claims he should have received probation because Jason Black, his co-perpetrator, did. This argument is based on a fundamental mischaracterization of the law, the evidence, and the record. Co-defendants are not entitled to the same sentence even if they are convicted of the same crimes. State v. Warnell, 864 P.2d 175, 178-79 (Idaho App. 1993). To the extent possible and reasonable, sentencing is an attempt at individualized justice. Utah's sentencing system is unlike the federal government's, where sentences are calculated by simple addition and subtraction.³ Here, a plethora of factors go into sentencing that cannot be reduced to numbers. These factors include the crime, the defendant's criminal history, and social and educational background as well as the public safety and the impact on victims. From evaluating these

² This point corresponds to defendant's point II.

³ In State v. Wright, 893 P.2d 1113, 1121 (Utah App. 1995), this Court stated: "This discretion [to sentence] is not to be surrendered to a mathematical formula by which numbers of circumstances rather than weight of circumstances are determinative. The overriding consideration is that the sentence is just. One factor in mitigation or aggravation may weigh more than several factors on the opposite scale."

verifiable bits of information, courts arrive at a perspective on the defendant and the amount of prison time, if any, needed to positively influence his future, exact punishment, and protect the safety of the public. Id.

Perhaps the single most important evidence in determining a sentence is the defendant's criminal history. Throughout his brief, defendant asserts that his criminal history is similar to Black's. Brief of defendant at 2, 6, 7, 8, 9. This claim is false. A brief look at the PSIs and the transcript from the sentencing hearing shows that defendant, unlike Black, had an extensive criminal history. As the prosecutor pointed out in his recommendation to the judge, to which defendant did not object, defendant was adjudicated guilty of 38 offenses while a juvenile (R. 62 at 17). Five of these adjudications were for crimes that would have been felonies if committed by adults (id.). Defendant also previously served a six-month juvenile probation sentence (id.).

By comparison, Black committed seven juvenile offenses and was never previously on probation. (Pre-sentence report of Jason John Black, attached to defendant's brief). Further, unlike defendant, Black cooperated with law enforcement and with AP&P after his conviction. The differences between the co-defendants is nicely shown by Detective Sutherland's comments in both PSIs. Detective Sutherland said of Black that he "does not believe the defendant [Black]

should go to prison, but he does believe the sentence should make an impression on the defendant to try and moderate his behavior.” (Pre-sentence report on Jason Black, at 5; attached to defendant’s brief). Regarding defendant, however, the detective said “[He] is responsible for quite a few vehicle thefts in the area over the last few months, and he does not believe the defendant will change his behavior because he does not care.” (Pre-sentence report on defendant, at 5; attached to defendant’s brief).⁴

AP&P’s evaluative summaries were similar in tone to these comments. The PSI described Black as “an excellent candidate for probation,” while casting doubt on its own recommendation for probation in defendant’s case, “His cooperation with this agency in arranging for this report is less than satisfactory leading Adult Probation & Parole to question whether the defendant will abide by the terms of probation.” (Black’s pre-sentence report at 9; defendant’s pre-sentence report at 12).

Defendant’s persistent and continuing criminal conduct gave sufficient reason for the trial court to treat him differently than Black. The constitutional requirement to apply the law uniformly does not require the courts to ignore

⁴ Although Detective Sutherland also said that he recommended defendant receive a sentence similar to Black’s, the trial court had the right to believe Sutherland’s comment was right, but that his sentence recommendation was wrong.

fundamental differences in background and character. Wright, 893 P.2d at 1121. These fundamental differences, which defendant still refuses to admit, required different sentences. The trial court thus fulfilled its mandate to consider each defendant individually to arrive at a just result and acted within its lawful discretion.

III. BECAUSE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA CAME MORE THAN 30 DAYS AFTER THE ENTRY OF THE PLEA, THE TRIAL COURT DID NOT HAVE JURISDICTION TO REVIEW THE MERITS OF THE REQUEST AND THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF THE MOTION ON THAT BASIS.⁵

On November 3, 1994, defendant entered his guilty plea (R. 62 at 8-9). The trial court told him he had 30 days to withdraw it (id.). Thus, under State v. Price, 837 P.2d 578 (Utah App. 1992), the 30-day time limit became jurisdictional and, if the defendant failed to bring his motion within 30 days, the trial court could not grant it. State v. Price, 837 P.2d at 583. Defendant did not file his motion to withdraw the guilty plea until January 27, 1995, more than two months after pleading guilty (R. 39).

⁵ The analysis under this point heading responds to points III, IV, and V of defendant's brief. Defendant's point VII also deals with the motion to withdraw the guilty plea, but this Court has already ordered it stricken.

In Price, this Court specifically held that the 30-day time limit was jurisdictional and could not be waived. Price, 837 P.2d at 583; Olson v. Salt Lake School District, 724 P.2d 960, 964 (Utah 1986) (acquiescence is insufficient to confer jurisdiction, which can be raised for the first time on appeal). Because the trial court did not have jurisdiction to entertain the merits of defendant's withdrawal motion, this Court should refuse to review the merits of the issues listed in defendants points III, IV, and IV and affirm the trial court's denial of the motion to withdraw defendant's guilty pleas.⁶

⁶ Even if this jurisdictional barrier did not preclude review of the merits, defendant's substantive claims are without either a legal or factual basis. Regarding point III, i.e., whether the knowledge of his co-defendant's sentence to probation wrongfully lulled him into pleading guilty, the cases defendant's cite do not stand for his essential premise that his subjective hope of getting a good deal defeats an admitted "intellectual understanding" that the court could sentence him to hard time. Brief of Defendant at 9. The trial court did tell defendant that it could go beyond the recommendations of AP&P and the prosecutor. The court never led defendant to believe he would get the same sentence as his co-defendant (R. 62 at 7).

Regarding point IV, i.e., the facts simply refute the allegation that the prosecutor did not fulfill his promise to recommend a diagnostic evaluation. During the change of plea hearing, prosecutor Jeppsen specifically told the court, "We're requesting a 90-day diagnostic evaluation" (R. 62 at 10). The defense attorney did not follow up on this request or even join in the motion and the trial court never ordered the evaluation. Ironically, the defense attorney actually asked to expedite the sentencing hearing, virtually assuring that no diagnostic evaluation could practically occur. Further, defendant's attorney affirmatively agreed to the imposition of sentence even without the evaluation (R. 62 at 16).

Concerning point V, the trial court's plea colloquy was thorough and in compliance with rule 11. The trial court went through each part of rule 11, explaining to defendant the rights he was surrendering, the elements of the offenses to which he was pleading and the supporting factual elements, the potential sentences, and the time limits for withdrawing the appeal (R. 62 at 6-9). Finally, the trial court found and concluded that the plea was made

IV. BECAUSE DEFENDANT DID NOT FILE AN AFFIDAVIT OF JUDICIAL BIAS WITH THE TRIAL COURT PURSUANT TO RULE 63(b), UTAH RULES OF CIVIL PROCEDURE, HE IS PRECLUDED FROM SEEKING APPELLATE REVIEW OF THE ISSUE.⁷

Defendant's claim that the judge's comments during the sentencing hearing evidenced personal bias should not be reviewed under the general principle that issues raised for the first time on appeal cannot be considered. Wade v. Stangl, 869 P.2d 9, 11 (Utah App. 1994) (holding that general principle applies to allegations of judicial bias). The rules of civil procedure expressly give litigants a mechanism by which they can raise their concerns of bias to the judge and then, if necessary, seek judicial review. Utah R. Civ. P. 63(b) (1995); Sukin v. Sukin, 842 P.2d 922, 926 (Utah App. 1992) (appellate court will not consider allegations of judicial bias under appellant first complied with rule 63(b)). Defendant never filed an affidavit with the trial court. Therefore, this Court should refuse to entertain the issue on the merits.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

knowingly and voluntarily (id.).

⁷ This point corresponds to point VI of defendant's brief.


ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

The State does not believe oral argument will assist the Court in deciding this case. Additionally, this case does not present novel or complicated issues that need to be published in order to assist courts and practitioners.

RESPECTFULLY SUBMITTED THIS 13th day of December 1995.

JAN GRAHAM

Utah Attorney General


JAMES H. BEADLES

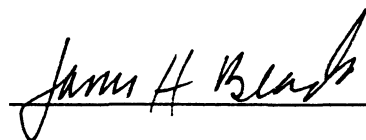
Assistant Attorney General

CERTIFICATE OF MAILING

On the 31 day of December 1995, two (2) copies of this ***BRIEF OF***

APPELLEE were sent by U.S. Mail, postage prepaid, to:

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A D D E N D A

A D D E N D U M A

77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

(3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.